FILED
APR 14 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 219

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

Appellant,

vs.

W. H. OSBORNE, JR., as Tax Commissioner of the State of Nebraska, GILBERT E. HAASE, as County Treasurer, Buffalo County, Nebraska, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

REPLY BRIEF FOR APPELLANT

TIMOTHY BYRON CLARK,
JESSE L. ROOT,
J. W. WEINGARTEN,
J. C. JAMES,
Counsel for Appellant.

BRUCE SCOTT,
Of Counsel.

NATIONAL PUBLISHING CO., PRINTERS, WASHINGTON, D. C.

INDEX TO DECISIONS

	Page
Railroad and Telephone Companies v. Board of Equalizers	4
Chicago, Rock Island & P. Ry. Co. v. Risty	4

SUBJECT INDEX

Page

1. Federal Courts do not except from equitable jurisdiction suits for the protection of a non-resident to prevent the collection of that proportion of its tax levied upon discriminatory and prejudicial assessment, if more than $3,000 be involved in the controversy, and a well-recognized ground for equitable jurisdiction be evident 3

2. The record in this case presents solely a question of law. The discussion in appellee's supplementary brief concerning the value of appellant's property within the State of Nebraska is not sustained by the evidence on that subject 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 219

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

Appellant,

vs.

W. H. OSBORNE, JR., as Tax Commissioner of the State of Nebraska, GILBERT E. HAASE, as County Treasurer, Buffalo County, Nebraska, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

REPLY BRIEF

ARGUMENT

I.

Appellee's supplementary brief asserts in effect (pp. 2-3) that suits to restrain the collection of taxes laid upon intentional, prejudicial and discriminatory assessment of a non-resident's property are excepted from the jurisdiction of a Federal Court on the equity side.

Appellant's former brief discusses chiefly the subject of jurisdiction because the order appealed from was made upon jurisdictional grounds solely (p. 2 former brief). We did not anticipate an argument to the effect that there can be no equity in a taxpayer's prayer for relief from the collection of taxes, no matter what the facts may be.

On this subject, District Judge Clark, in Railroad & Telephone Companies vs. Board of Equalization, 85 Fed. 302, 320, said:

> Whether the constitution or the supreme law of the land has been violated is a question for the judiciary, and not the legislative department, and an inquiry like this can no more be shut off indirectly than it can directly. If we could suppose the case of a Board of Equalization making a superficial or perfunctory showing of equalization no one would venture, as I think, to claim that this would exclude a judicial investigation, as to whether, in effect, there was nevertheless an oppressive discrimination in respect of a large class of property.

So also District Judge Elliott's statement in Chicago, R. I. & P. Ry. Co. vs. Rist, 282 Fed. 364, 371.

> The remedy at law must be a remedy on the law side of the Federal Court, not a

> remedy in the State Courts of South Dakota. In each of these cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiffs relief because there may be a remedy in the courts of the State; for the reason that the non-resident is not required to subject himself to jurisdiction of the courts of the State in order to obtain relief.

These cases, together with many other citations, some relating to tax cases, but more to other controversies, may be found on pages 28 and 30 of our former brief. These cases do but declare that a chancellor may have a duty to perform in protecting a taxpayer subjected to systematic intentional and prejudicial overvaluation of his property for the purposes of taxation, as compared with the valuation of other taxpayers' property in the community where the non-resident's property is situated. See also the citation and discussion on pages 20 to 25 of our former brief.

EVIDENCE RELATING TO THE VALUE OF APPELLANT'S PROPERTY WITHIN THE STATE OF NEBRASKA.

Appellee's arguments and statements on pages 3, 19 and 29 of their first brief filed plainly concede and state that they rely solely upon questions of law to sustain the order in their favor from which this appeal has been prosecuted. But on

page 2 of their supplemental brief appellees' assume to discuss the evidence with respect to the value of appellant's property within the State of Nebraska. If the Court agrees with us that the discussion is beside the mark, the remainder of this brief will be as irrelevant as those comments; but should the Court desire to pursue that proposition it is possible from a consideration of those comments solely that an inference might be derived that the value of the Burlington property in Nebraska in 1922 exceeded $200,000,000. The comments emphasize Exhibits 35 (Tr. 158) and Mr. Morgan's testimony (Tr. 100).

The exhibit is a tabulated estimate of the Burlington's engineers of the value of the various items relating to the physical value of the Railroad Company's property in that State July 1, 1909; it also reveals deductions made by the Commission from those estimates and the present value of that property as of July 1, 1909. Amongst the larger deductions from the estimates are:

For right-of-way and station grounds...	$11,603,571.74
Ballast	3,138,652.82
Track laying and surfacing	2,662,164.80
Interest	22,759,661.89
Discount	13,303,704.26

The sum of the deductions is $80,218,074.81, so that making allowance for depreciation the value of the Burlington's property in Nebraska July 1, 1909, including all property used in the construction and operation of its railroad in that State, in-

cluding also expenses, stationery and printing, insurance, taxes, interest, organization, commission, discount, stores and supplies, contingencies and unexplained items, is $104,502,614.22, and not $200,000,000.

The $18,000,000 referred to in the comments is not confined to "extensions, additions and betterments," but includes as well, equipment, without depreciation.

A report of the State Railway Commission dated July 1, 1911, excluding abandoned right-of-way and lines, states the value of the Burlington's property in Nebraska as follows:

Subject	Reproduction Cost New	Present Value	Present Value New Formula
(a) Mkt. Val. Land only	$128,730,333	$108,242,493	$103,592,129
(b) Inc. Acq. and Rt.-of-way	135,850,484	115,362,644	110,713,897

(Tr. 186, 187.)

On page 634 of the 1914 report to the Governor by the Nebraska State Railway Commission, the physical valuation of appellant's property in Nebraska July 1, 1913, is stated to be, according to one formula, $109,888,797; and according to another formula, $104,994,348. (Tr. 190.)

The finding of the State Railway Commission in their official report to the Governor July 1, 1911, reveals the value of the Railroad Company's property in Nebraska July 1, 1911, $103,592,129. (Tr. 86, 87.)

Mr. Morgan, appellant's assistant auditor, formerly Examiner of Accounts for the Interstate

Commerce Commission, testified to four recognized formulae, useful in determining the value of railroad property. As applied to the Railroad Company's property in Nebraska, the result is as follows:

1. Value of stocks and bonds for the system yielding	$497,827,260.00
Deducting non-operating property	73,677,476.14
(Tr. 99.)	$424,149,783.86
2. Investment in road and equipment per book accounts	$515,760,467.89
3. Physical value found by Nebraska State Railway Commission July 1, 1913	104,994,348.00
Plus money expended subsequent to that valuation for extensions, additions and betterments in Nebraska	10,388,405.00
Plus investment for equipment allocated to Nebraska since July 1, 1913	7,398,708.32
(Tr. 100)	$122,781,461.43

This does not include depreciation,

4. The average net railway operating income of appellant in the State of Nebraska for the five-year period ending December 31, 1921	$6,982,743.00
Capitalized at seven per cent	99,782,043.00
Average of the four bases produced a value for Nebraska	$108,651,522.00
Or per mile	37,969.00

22.56 per cent of the system's valuation is allocated to Nebraska, upon an average of four methods applied to a period of five years, commencing with 1917.

Nebraska Proportion of System	*1917 to 1921, Incl.*
All track mileage	26.63%
Car and locomotive mileage	21.15%
Tons and passengers one mile	18.85%
Gross Operating Revenues	23.65%
Average of the four (P. 99 Rec.)	22.56%

There are 2,861 miles of Burlington roadway in Nebraska, a very considerable fraction of which is branch mileage (Tr. 178). These lines are laid through or into 72 of the 91 counties in the State, and traverse the semi-arid regions and the vast territory suitable solely for grazing.

Assuming $100,000,000 to be the value of the Burlington's Nebraska property, the valuation per mile would be $34,945.00. (Tr. 29.)

Assuming the Burlington's Nebraska property to be worth its assessed value for 1922, $137,589,-782, its valuation per mile would be $48,000.00.

Assuming that it was assessed at but 65% of its actual value as intimated in the comments referred to, the actual value would be $211,676,-587.00.

Per mile for Nebraska, $79,480.

Whereas the value of its total investment in road and equipment for the entire system up to December 31, 1921, as shown by Exhibits 36 and 37, introduced by appellees, was but $515,760,467.00, its investments in stocks and bonds of affiliated companies on that date were $42,883,966.00.

Its current assets on that date were largely balanced by current liabilities. (Tr. 158.)

Its average value per mile based on these items would be but $62,270.

The Burlington's total mileage operated in all of the States December 31, 1921, was 13,394 miles, of which it owned 8,900 miles (Tr. 72). These States include Illinois, Minnesota, Iowa and Missouri, where there is a much greater density of population, and a much greater traffic than in Nebraska. The inference will not be permitted that the State Board assessed the Burlington's property at less than its "*full actual value.*" (Tr. 107, 114, 123.)

The formula for the 1922 assessment reveals that to the 1921 valuation was added from the net earnings for that year, $5,834,057, to constitute the $137,589,782, valuation for 1922. (Tr. 122.) This in face of the fact that all of the net earnings for 1921 were paid out in dividends, fixed charges, etc., before the close of that year.

It is most respectfully submitted that appellant's supplementary brief brings forward no suggestions of merit to aid in sustaining the order assailed by the appeal in this case.

TIMOTHY BYRON CLARK,
JESSE L. ROOT,
J. W. WEINGARTEN,
J. C. JAMES,
Counsel for Appellant.

BRUCE SCOTT,
Of Counsel.